BRIEF

TO THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

REGARDING BILL C-10

(An Act to amend the Criminal Code (mental disorder) and to make consequential amendments to other Acts)

Appearance: Tony Cannavino, President
David Griffin, Executive Officer

Date: May 4, 2005

Introduction

The Canadian Professional Police Association (CPPA) welcomes the opportunity to present our submissions to the Senate Standing Committee on Legal and Constitutional Affairs with respect to your review of Bill C-10, An Act to Amend the *Criminal Code of Canada* (Mental Disorder).

The CPPA is the national voice for 54,000 police personnel across Canada. Through our 225 affiliates, membership includes police personnel serving in police services from Canada's smallest towns and villages as well as those working in our largest municipal and provincial police services, the RCMP Members Associations, and First Nations police officers.

The Canadian Professional Police Association is acknowledged as a national voice for police personnel in the reform of the Canadian criminal justice system. We are motivated by a strong desire to:

- Enhance the safety and quality of life of the citizens in our communities;
- Share the valuable experiences of those who are working on the front lines; and
- Promote public policies that reflect the needs and expectations of law-abiding Canadians.

The CPPA was created in 2003, with the merger of the Canadian Police Association (CPA) and National Association of Professional Police (NAPP). The CPA had taken a special interest in the mental disorder issue, as Intervenors in the case of *R. v. Lepage*, which was decided together by the Supreme Court of Canada with the cases of Winko, Orlowski and Besse. This judgment of the Supreme Court of Canada upheld the current provisions of Part XX.I of the *Criminal Code of Canada*, dismissing arguments that these provisions infringed upon individual rights to liberty, security of the person and equality as guaranteed by Sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*.

The CPA appeared before the House of Commons Standing Committee on Justice and Human Rights in 2002, during their review of the Mental Disorder provisions, and we were pleased to see that many of the recommendations we made at that time have been incorporated in Bill C-10.

The CPPA made submissions to the House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness concerning Bill C-10 in December of 2004, and we welcome the amendments to the Bill which were proposed unanimously by the Committee and accepted by the House of Commons. In particular, we support the changes which will:

- allow assessments by persons other than medical practitioners, if they are designated by an Attorney General as qualified to conduct an assessment of the mental condition of the accused (e.g., psychologists in addition to psychiatrists);

- give victims, on their request, notice of hearings and notice of provisions applicable to them (e.g., those on victim impact statements and publication bans);

- notify victims of their entitlement to file a victim impact statement if an assessment report suggests a change in the accused's mental condition that might warrant a discharge;

- permit a court to grant a stay of proceedings in the case of a permanently unfit accused only where the accused is not likely to ever become fit and only on the basis of clear information; and

- clarify the options open to police when they arrest an accused for contravention of a disposition or an assessment order.

Winko v. British Columbia

This decision of the Supreme Court of Canada has provided considerable guidance in the application of the current provisions in force, and, in our respectful submission, offers abundant and irrefutable support for our assertion that the unproclaimed provisions are neither required nor, more importantly, in the public interest.

In *Winko* the Court confirmed that *"Any restrictions on the liberty of NCR (Not Criminally Responsible) accused are imposed to protect society and to allow the NCR accused to seek treatment, not for penal purposes."* (Emphasis added) A separate and distinct regime has been established under Part XX.I to deal with those persons who are unfit to stand trial or not criminally responsible on account of mental disorder. Under this regime, an NCR accused is diverted into this special process, whereby *"the emphasis is on achieving the twin goals of protecting the public ands treating the mentally ill offender fairly and appropriately."*

The Court articulated a clear interpretation of the duties imposed upon a court or review Board that is charged with determining the disposition of a NCR accused under Section 672.54:

1. *The court or Review Board must consider the need to protect the public from dangerous persons, the mental condition of the NCR accused, the reintegration of the NCR accused into society, and the other needs of the NCR accused. The court or Review Board is required in each case to answer the question: does the evidence disclose that the NCR accused is a "significant threat to the safety of the public"?*

2. *A "significant threat to the safety of the public" means a real risk of physical or psychological harm to members of the public that is serious in the sense of going beyond the merely trivial or annoying. The conduct giving rise to the harm must be criminal in nature.*

3. *There is no presumption that the NCR accused poses a significant threat to the safety of the public. Restrictions on his or her liberty can only be justified if, at the time of the hearing, the evidence before the court or Review Board shows that the NCR accused actually constitutes such a threat. The court or Review Board cannot avoid coming to a decision on this issue by stating, for example, that it is uncertain or cannot decide whether the NCR accused poses a significant threat to the safety of the public. If it cannot come to a decision with any certainty, then it has not found that the NCR accused poses a significant threat to the safety of the public.*

4. *The proceeding before the court or Review Board is not adversarial. If the parties do not present sufficient information, it is up to the court or Review Board to seek out the evidence it requires to make its decision. Where the court is considering the matter, it may find in such circumstances that it cannot readily make a disposition without delay and that it should be considered by the Review Board. Regardless of which body considers the issue, there is never any legal burden on the NCR accused to show that he or she does not pose a significant threat to the safety of the public.*

5. *The court or Review Board may have recourse to a broad range of evidence as it seeks to determine whether the NCR accused poses a significant threat to the safety of the public. Such evidence may include the past and expected course of the NCR accused's treatment, if any, the present state of the NCR accused's medical condition, the NCR accused's own plans for the future, the support services existing for the NCR accused in the community, and the assessments provided by experts who have examined the NCR accused. This list is not exhaustive.*

6. *A past offence committed while the NCR accused suffered from a mental illness is not, by itself, evidence that the NCR accused continues to pose a significant risk to the safety of the public. However, the fact that the NCR accused committed a criminal act in the past may be considered together with other circumstances where it is relevant to identifying a pattern of behaviour, and hence to the issue of whether the NCR accused presents a significant threat to public safety. The court or Review Board must at all times consider the circumstances of the individual NCR accused before it.*

7. *If the court or Review Board concludes that the NCR accused is not a significant threat to the safety of the public, it must order an absolute discharge.*

8. *If the court or Review Board concludes that the NCR accused is a significant threat to the safety of the public, it has two alternatives. It may order that the NCR accused be discharged subject to the conditions the court or Review Board considers necessary, or it may direct that the NCR accused be detained in custody in a hospital, again subject to appropriate conditions.*

9. *When deciding whether to make an order for a conditional discharge or for detention in a hospital, the court or Review Board must again consider the need to protect the public from dangerous persons, the mental condition of the NCR accused, the reintegration of the NCR accused into society, and the other needs of the NCR accused, and make the order that is the least onerous and least restrictive to the NCR accused.*

[1999] 2 S.C.R. ***Winko v. British Columbia (Forensic Psychiatric Institute)***

The court noted that "*the court or Review Board has a duty not only to search out and consider evidence favouring restricting NCR accused, but also to search out and consider evidence favouring his or her absolute discharge or release subject to the minimal necessary restraints, regardless of whether the NCR accused is even present."*

Submissions

Prima Facie Case Obligation

Where an accused is determined to be unfit to stand trial, an inquiry must be held every two years to determine sufficient evidence can be adduced to put the accused on trial (Section 672.33).

This is in addition to the assessments conducted, no less than annually, to determine whether the person is fit to stand trial. While this provision ensures that a person is not being held when the crown is unable to prove its case, it also presents some concern in the event that the crown is unable to prove its case yet the accused remains a danger to the community.

While we do not have any specific knowledge of cases involving this requirement, it is obviously conceivable that a dangerous accused could be returned to the community due to evidentiary challenges faced by the Crown for older cases. In this case the person may fall under the jurisdiction of provincial health legislation.

Evidence raised by the CPA in *LePage* identified that provincial mental health laws are not structured to adequately protect the public in such circumstances. Provincial health laws are focused on different objectives and are not intended to deal with this type of circumstance.

We recommend that the committee consider the appropriateness of removing the crown's obligation after the first two year review, where the person remains unfit to stand trial and presents a significant threat to public safety. The person would remain subject to annual reviews, at minimum, to determine if the person's status has changed.

Unproclaimed Capping Provisions

We are pleased that Bill C-10 repeals the unproclaimed provisions dealing with capping, dangerous mentally disordered accused and hospital orders. We have consistently argued that these provisions should not be proclaimed in force and should be repealed. Successive Ministers of Justice have exercised appropriate judgment and prudence by not moving forward with these provisions.

The Supreme Court of Canada has rejected arguments that the existing in force provisions of the *Criminal Code* infringe upon Charter rights without the capping provisions. This provides important guidance to the committee, as the original capping and Dangerous Mentally Disordered Accused provisions were introduced as a legislative package to address *Charter* concerns when the preceding law was struck down.

We have consistently argued that there is no bona fide reason for the capping provisions to be proclaimed and that to do so would pose tremendous public safety consequences.

As this committee has heard, capping was not proclaimed at the time the legislation was enacted, in order to permit provinces to make necessary amendments to their mental health legislation. It has since been determined that provincial mental health legislation does not provide adequate scope and is not designed to protect the public in the same manner as the regime in the *Criminal Code*. The intended seamless blending of federal and provincial mental health legislation has not, and will not occur. Nor is it required.

The Supreme Court has described the *Criminal Code* regime as one that treats the offender with dignity and the maximum liberty compatible with the goals of public protection and fairness to the accused. The law does not infringe upon fundamental rights and freedoms, it preserves them. An offender found to be NCR who is determined to be a *"significant threat to the safety of the public"* is removed from the penal stream and subject only to those restrictions required to protect society and allow the accused to seek treatment.

This determination is to be considered at least annually. If the court or Review Board later determines the NCR accused to no longer be a *"significant threat to the safety of the public"*, it must order the accused's discharge.

We therefore submit that the capping provisions provide no bona fide constructive enhancement to this process, pose serious public safety concerns, and should therefore be repealed.

In addition to our concerns with respect to the capping provisions, the unproclaimed Dangerous Mentally Disordered Accused (DMDA) provisions would also be limited value in protecting society, as the provisions require a determination to be made at the time of the originally NCR finding, not at the time the cap takes effect. As the threshold for DMDA classification is high, it is unlikely that many offenders will be classified in this manner. An accused whose condition deteriorates over time will in fact present a higher risk to the public at the time of release than that presented at the original court determination.

The current regime is highly preferable to the capping and DMDA provisions, and we strongly support the repeal of these unproclaimed provisions.

Role of Victims

As professionals engaged at the front end of the justice system, police officers are acutely aware of the frustrations that can be felt by victims of crime when such complex legal systems are applied. While our laws have become increasingly responsive to the needs and legitimate role that victims expect in our justice system, this is not universal. We have argued that victims should be afforded information about the progress of the accused's case and an opportunity to provide a victim's impact statement at any time that release is being considered. As victims often have family or other close relationships with the accused, there need to be assurances that victims can and will be heard by the court or review board. We are pleased that the amendments contained in Bill C-10 afford victims the right to prepare a statement and present the statement at the hearing, and provides measures for notification of the victim. We also support the provisions which address the need to protect certain witnesses and victims from being identified.

We have previously argued that courts and Review Boards should, as a matter of practice, contact victims during the review process to ensure they are aware of the progress of the case. The victim may also possess information that is relevant to the review, and should be afforded an opportunity to be heard in the review process. It is important for the offender to hear from the victim about the impact of his/her actions. This is particularly important for those with mental disorders whose condition may be managed by medication. Understanding the impact of their actions helps to reinforce the importance of continuing with medication, even if the treatment presents undesirable side effects. We submit that this is consistent with contemporary legislation.

The CPPA made submissions to this effect before the House of Commons Standing Committee on Justice and Human Rights concerning Bill C-10 in December of 2004. We are pleased by the amendments to the Bill concerning victims which were proposed unanimously by the Committee and accepted by the House of Commons.

- provide victims, on their request, notice of hearings and notice of provisions applicable to them (e.g., those on victim impact statements and publication bans);

- notify victims of their entitlement to file a victim impact statement if an assessment report suggests a change in the accused's mental condition that might warrant a discharge.